FINAL BRIEF **ORAL ARGUMENT SCHEDULED SEPTEMBER 16, 2008**

Nos. 07-1300, 07-1345

UNITED STATES COURT of APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

J.J. CASSONE BAKERY, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

BAKERY, CONFECTIONARY and TOBACCO WORKERS' UNION, LOCAL 3

Intervenor

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

J.J. CASSONE BAKERY, INC.	)	
	)	
Petitioner/Cross-Respondent	)	
	)	
v.	)	**No. 07-1300**
	)	**Board Case No.**
NATIONAL LABOR RELATIONS BOARD	)	**2-CA-32559**
	)	
Respondent/Cross-Petitioner	)	
	)	
	)	
and	)	
	)	
BAKERY, CONFECTIONARY and TOBACCO WORKERS' UNION, LOCAL 3	)	
	)	
Intervenor	)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Rule 28(a)(1) of the Rules of this Court, counsel for the National Labor Relations Board ("the Board") certify the following:

A. Parties: J.J. Cassone Bakery, Inc. ("the Company") was the respondent before the Board and is the petitioner/cross-respondent before the Court. The Board is the respondent/cross-petitioner before the Court. The Bakery, Confectionary and Tobacco Workers' Union, Local 3 ("the Union"), and individuals Lorenzo Macua and Cabrilio Flores were the charging parties before

the Board. The Union is the intervenor before this Court. The Board's General Counsel was also a party before the Board.

B. Rulings Under Review: This case is before the Court on the Company's petition for review and the Board's cross-application for enforcement of a Decision and Order issued by the Board on June 26, 2007 and reported at 350 NLRB No. 6.

C. Related Cases: This case has not previously been before this or any other court. Board Counsel are unaware of any related cases either pending or about to be presented before this or any other court.

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Dated at Washington, D.C.
this 17th day of June 2008

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ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the petition of J.J. Cassone Bakery, Inc. ("the Company") to review, and on the cross-application of the National Labor Relations Board ("the Board") to enforce, a Board Order issued against the Company. The Bakery, Confectionary, and Tobacco Workers' Union, Local 3 ("the Union"), the charging party before the Board, has intervened in support of the Board.

The Board had subject matter jurisdiction under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) ("the Act"). The Court has jurisdiction over this proceeding pursuant to Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), which provides that petitions for review of Board orders may be filed in this Court and that the Board may cross-apply for enforcement.

The Board's Decision and Order issued on June 26, 2007, and is reported at

350 NLRB No. 6. (JA 43-69.)[1] The Board's Order is final with respect to all parties under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). The Company filed its petition for review on August 1, 2007. The Board filed its cross-application for enforcement on August 31, 2007. The petition for review and the cross-application for enforcement are timely; the Act contains no time limit on the institution of proceedings to review or enforce Board orders.

STATEMENT OF THE ISSUE PRESENTED

Whether the Board reasonably determined that a remand to a different administrative law judge to review the record and issue a decision was the proper remedy to cure any appearance of partiality caused by the original judge's verbatim reliance on parties' briefs in his decision. If so, the Board is entitled to summary enforcement of its unfair labor practices order, which the Company does not challenge on the merits.

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[1] Record references in this brief are as follows: "JA" references are to the Joint Appendix submitted by the Company. "SA" refers to the Supplemental Appendix also submitted by the Company. "Br." refers to the Company's opening brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

RELEVANT STATUTORY PROVISIONS

The pertinent statutory provisions are included in the addendum to this brief.

STATEMENT OF THE CASE

This case came before the Board on a consolidated complaint issued by the General Counsel pursuant to charges filed by the Union and two former employees. (JA 47-48; 161, 171, 173, 175, 180.) On January 31, 2002, following a hearing, an administrative law judge issued a decision finding merit to most of the complaint's unfair labor practice allegations. (JA 12-27.) The Company and the General Counsel filed exceptions to parts of the judge's decision. (JA 11; 29-42.) On December 6, 2005, the Board (Chairman Battista and Members Liebman and Schaumber) remanded the proceedings to a new administrative law judge with instructions to review the record and issue a decision. (JA 11.)

On February 22, 2006, the new judge issued a decision, finding that the Company committed numerous unfair labor practices, including unlawfully discharging, disciplining, threatening and interrogating employees. (JA 47-69.) On June 26, 2007, the Board (Chairman Battista and Members Liebman and Schaumber) issued a Supplemental Decision and Order adopting most of the new judge's findings and recommended order.

(JA 43-45.) This case is before the Court on the Company's petition for review and the Board's cross-application for enforcement.

STATEMENT OF THE FACTS

I. THE BOARD'S FINDINGS OF FACT

A. The Company Coerces, Threatens, Interrogates, Suspends, and Discharges Employees and Union Activists During a Representation Election Campaign

The Company is a family-owned bakery located in Port Chester, New York, that produces bread and other baked goods, which it then sells in its own store and to other retail outlets. (JA 48.) Since 1979, the Union has petitioned for and lost six elections seeking to represent the Company's employees. (JA 52; 162-163.) In September 1999, the Union started its most recent organizing drive. (JA 48.) The instant case involves the Company's aggressive response to the Union's organizing campaign.

The Company responded quickly to the Union's campaign, sending antiunion letters to employees, holding "captive audience" employee meetings, and announcing new benefits. (JA 52, 53; 90, 92, 100, 191-194.) The Company instructed supervisors to state their opposition to the Union emphatically, even "at the risk of being over-zealous and even if innocently you should commit an unfair

labor practice." Supervisors and leadmen[2] took that message to heart. (JA 52, 53; 204.)

Throughout the campaign, management interrogated employees regarding union sympathies, and employees learned that management was closely monitoring their union activities. (JA 53; 94, 103, 128.) Leadmen fully embraced the opportunity to be "over-zealous": They threatened employees, telling them that, if they voted for the Union, they would lose their pension, the Union would ask for their green cards, and they would face a reduction in work hours. (JA 53, 54; 80, 103, 107, 110-111, 113.) They also told employees that voting for the Union was "ignorant" and futile. (JA 54; 131-132.) One leadman went so far as to threaten employees and their families with unspecified violence if the employees voted for the Union. (JA 53; 83, 94.)

In the days leading up to the election, the Company stepped up its response to the campaign, suspending and discharging two known and outspoken union organizers. (JA 55-58; 73-78, 87-89, 112, 115-122, 126, 196-198.) After the election, which the Union lost, the Company continued its campaign against the Union, systematically terminating or disciplining every known union supporter and

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[2] Each production line at the Company's bakery had a leadman, who, among other things, ensured quality production and proper staffing. (JA 51-52.) The Board found (JA 51-52), and the Company does not dispute, that the leadmen are agents of the Company.

member of the Union's organizing committee. (JA 48; 49-64, 95, 97, 105, 129, 134-135, 138, 199.)

B. The Union and Two Discharged Employees File Charges Against the Company, and the General Counsel Issues a Complaint; Administrative Law Judge Edelman Issues a Decision Finding that the Company Committed Numerous Unfair Labor Practices

The Union and two former employees filed charges against the Company, and the General Counsel issued a complaint. (JA 47-48.) Following a 12-day hearing that lasted over 8 months, Administrative Law Judge Howard Edelman issued a decision, finding that the Company committed numerous unfair labor practices. Judge Edelman recommended that the Company be ordered to cease and desist from the unlawful conduct and to take affirmative remedial action. (JA 26.) In his decision, Judge Edelman copied verbatim portions of the General Counsel and Union's briefs. (JA 11.)

The Company filed exceptions to that decision. Among other things, the Company asserted that the judge acted improperly by extensively copying the post-hearing briefs filed by the General Counsel and the Union. (JA 11.)

C. The Board Remands the Case for Assignment to a Different Administrative Law Judge

After reviewing the record, the Board (Chairman Battista and Members Liebman and Schaumber) found that the judge's "extensive copying" of the briefs was "troubl[ing]" and "create[d] the appearance of partiality in favor of the

General Counsel and . . . Union." (JA 11.) However, because the Board's "review of the record satisfie[d] [it] that Judge Edelman conducted the hearing itself properly," the Board rejected the Company's call for a *de novo* hearing. (JA 11.) But, "in order to dispel the impression of partiality," the Board remanded the case for review by a different judge. (JA 11.) The Board stated that it took such action "reluctantly because the transcript of the hearing satisfies us that Judge Edelman conducted the hearing impartially and in an appropriately judicial manner." (JA 11.) The Board further emphasized that it did not want to "suggest that the judge's findings were in error." (JA 11.)

The Board's remand order instructed the new judge to "reopen the record only if necessary," and allowed the new judge to rely on Judge Edelman's demeanor-based credibility determinations "unless they are inconsistent with the weight of the evidence." (JA 11.) In such a case, the Board gave the judge two options: First, the judge could consider "'the weight of the respective evidence, established or admitted facts, inherent improbabilities, and reasonable inferences which may be drawn from the record as a whole.'" (JA 11) (citations omitted). Second, the judge enjoyed the discretion to reconvene the hearing and recall witnesses for further testimony, to make his or her own demeanor-based findings. (JA 11.)

D. The Parties Reject the New Judge's Invitation To File Briefs or To Recall Witnesses; the New Judge Issues a Decision

The instant case was reassigned to Administrative Law Judge Steven Davis. Prior to deciding the matter, Judge Davis offered the parties an opportunity to file briefs concerning the Board's order. No party accepted that invitation. Likewise, though the option was available, no party requested that Judge Davis reopen the hearing or recall any witnesses for further testimony. (JA 47, nn. 1-2.)

In issuing his decision, Judge Davis analyzed Judge Edelman's demeanor-based credibility determinations, and found them "completely consistent with the weight of the evidence, and . . . fully supported by the evidence," with the exception of one witness's testimony. (JA 48-49.) Judge Davis explained that he made independent credibility determinations based "on the weight of the respective evidence, established and admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole." (JA 49.)

Although Judge Davis dismissed some allegations, he found that the Company committed numerous unfair labor practices, including unlawful interference with employees' rights and unlawful suspension and discharge. The Company, the Union, and the General Counsel each filed exceptions to parts of the judge's decision. In particular, the Company objected to Judge Davis's demeanor-based credibility determinations. (JA 43.)

II. THE BOARD'S CONCLUSIONS AND ORDER

The Board (Chairman Battista and Members Liebman and Schaumber) agreed with Judge Davis that the Company violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by discriminatorily suspending four employees and terminating four others. (JA 43.) The Board also found, in agreement with the judge, that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by making unlawful statements, including threats, promises of benefits, and two interrogations.[3] (JA 43.)

In so finding, the Board examined Judge Davis's credibility assessments and found them consistent with the weight of the evidence. (JA 43 n.2.) The Board found no merit to the Company's challenge to Judge Davis's use of Judge Edelman's credibility findings. Specifically, the Board explained that its "established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect." (JA 43 n.2.) Noting that it had "carefully examined the record," the Board determined that it could find no basis for reversing the judge's credibility determinations. (JA 43 n.2.)

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[3] The Board (Chairman Battista and Member Schaumber, Member Liebman dissenting) dismissed (JA 45) one unlawful discharge claim, finding that the Company met its burden of proving that it would have discharged that employee absent his union activities. The Board also dismissed a Section 8(a)(1) interrogation as cumulative. (JA 45 n.5.)

The Board's Order requires the Company to cease and desist from the unfair labor practices found. (JA 67-68.) Affirmatively, the Board ordered the Company to make whole the four employees it unlawfully suspended and the four employees it unlawfully discharged, to offer reinstatement to those who were discharged, and to rescind and remove from its files any reference to those unlawful actions. (JA 68.) The Company must also post copies of a remedial notice. (JA 68.)

SUMMARY OF ARGUMENT

Faced with another union organizing campaign, the Company launched a vigorous response, instructing its leadership to risk even incurring an unfair labor practice charge when responding to the Union's organizing efforts. From the outset, the Company unlawfully engaged in surveillance of the employees' union activities and announced new benefits. Likewise, management officials and leadmen did not disappoint, committing numerous unlawful acts that included threatening employees with physical harm, loss of benefits, reduction in hours, and inquiries regarding their legal status. The culmination of the Company's antiunion campaign was the suspension and discharge of most of the known union supporters and members of the Union's organizing committee.

Instead of challenging the merits of the unfair labor practice findings, the Company challenges only one facet of the Board's decision: Whether Judge Edelman's copying of the General Counsel and Union's briefs in his decision violated the Company's right to a fair hearing. However, the Company's arguments lack merit. This Court has found that the verbatim adoption of briefs into a decision is not grounds for reversal and does not warrant a *de novo* review. The Board's remand to a different judge to review the record and make independent findings provided adequate protection against any possible bias. Indeed, both Judge Davis and the Board conducted an independent and adequate

review of the record that expunged any possible impression of partiality that Judge Edelman's brief copying may have caused. Further, Judge Davis's credibility determinations did not rely solely on Judge Edelman's findings regarding witness demeanor. Rather, the record shows that Judge Davis conducted a thorough review of the record with an untainted eye and properly made credibility findings on bases other than demeanor.

Finally, the Company claims before the Court for the first time that the Board's remand violated specific provisions of the Administrative Procedure Act. Under the waiver provisions of Section 10(e) of the Act, however, the Court has no jurisdiction to consider this argument because the Company failed to bring it to the Board's attention in the first instance.

In sum, because the Company has failed to challenge the merits of the Board's unfair labor practice findings, and because the Board's remand remedied any impression of partiality, the Order is entitled to full enforcement.

ARGUMENT

I. THE BOARD'S REFUSAL TO ORDER A *DE NOVO* HEARING DID NOT VIOLATE THE COMPANY'S RIGHT TO DUE PROCESS

The hearing in the instant case lasted 13 days, involved over 20 witnesses, and resulted in over 1700 pages of transcript. After "carefully reviewing the entire record," the Board found (JA 11) that Judge Edelman conducted those proceedings "properly," "impartially[,] and in an appropriately judicial manner." In fact, the Company does not claim that Judge Edelman engaged in any behavior that prevented the Company from fully and fairly presenting its case.

Rather, faced with overwhelming evidence demonstrating that it committed numerous unfair labor practices, the Company has latched onto Judge Edelman's copying portions of the parties' briefs into his decision as an opportunity for a new hearing. Specifically, the Company contends (Br. 23-24) that any appearance of partiality that the judge's copying may have created deprived it of a fair hearing. The Company also contends (Br. 27-32) that Judge Davis's adoption of Judge Edelman's demeanor-based credibility determinations violated its right to due process.

Because the Company does not challenge any of the Board's unfair labor practice findings, it has effectively waived its right to contest those findings on their merits. *See Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175, 1181 (D.C.

Cir. 2000) (employer's failure to contest the Board's unfair labor practice findings waives claims on appeal). *See also National Steel and Shipbuilding Co. v. NLRB*, 156 F.3d 1268, 1273 (D.C. Cir. 1998) (same). Thus, if the Court determines that the Board's Remand Order is "supported by the record" and is a "reasonable" response to Judge Edelman's copying, the Board is entitled to full enforcement of its Order. *Casino Ready Mix, Inc. v. NLRB*, 321 F.3d 1190, 1202 (D.C. Cir. 2003).

A. Excessive Reliance on Parties' Briefs Does Not Warrant the Extraordinary Remedy of a *De Novo* Hearing

A *de novo* hearing is a disproportionate response to a judge's copying of briefs in his written decision. This Court has held that a judge's incorporation of substantial portions of a brief into a decision—while a questionable practice—is not inherently prejudicial or an otherwise reversible error. As the Court explained: "Although . . . wholesale cutting and pasting from proposed findings and conclusions warrants particularly close scrutiny . . . this practice alone [does not] demonstrat[e] impermissible bias." *Waterbury Hotel Management, LLC v. NLRB*, 314 F.3d 645, 651 (D.C. Cir. 2003). Indeed, the Supreme Court has come to a similar conclusion. *See Anderson v. Bessemer City*, 470 U.S. 564, 572 (1985) ("[E]ven when the trial judge adopts proposed findings verbatim, the findings are those of the court and may reversed only if clearly erroneous."). And, under circumstances similar to those here, this Court has found "perfectly reasonable" the

Board's decision to hold a judge's copying of briefs not reversible error. *Casino Ready Mix*, 321 F.3d at 1202. *See also Abhe & Svoboda, Inc. v. Chao*, 508 F.3d 1052, 1059 (D.C. Cir. 2007) (holding as "contrary to relevant precedent," a claim that copying of briefs into a decision violates due process rights).

Although the Company admits (Br. 20) that copying of briefs alone is not sufficient to warrant a new hearing, it claims (Br. 23) that the instant case involves "something more," namely, the "appearance of bias." The Company claims (Br. 24) that the Board's finding (JA 11) that the copying created the appearance of partiality "inevitably requires" a new hearing. However, as this Court has explained, there is no "mandated" process by which the Board determines the independence and impartiality of a judge's decision. *Casino Ready Mix*, 321 F.3d at 1202. Rather, the Board resolves such questions on a "case-by-case basis." *Id.* As explained below, the Board resolved the question properly here.

1. An independent review of the record cures any impression of bias created by the judge's copying of the parties' briefs into his decision

This Court has found that the Board's own independent review of the record, with "appropriate scrutiny" of the judge's decision, is an effective remedy against any perceived defect caused by copying parties' briefs in a decision. *Waterbury Hotel Management, LLC v. NLRB*, 314 F.3d 645, 651 (D.C. Cir. 2003). *See also Casino Ready Mix*, 321 F.3d at 1202; *EEOC v. Federal Reserve Bank*, 698 F.2d

633, 639-42 (4th Cir. 1984) ("careful scrutiny" is necessary and findings must be "more narrowly" examined when trial court merely reprints proposed findings).

The Board's remand order to a different judge to review the record and make well-reasoned findings supported by the evidence provided the close scrutiny necessary to remove any impression of partiality caused by Judge Edelman's verbatim use of the briefs in the original decision. Pursuant to the Board's instructions on remand, Judge Davis accepted Judge Edelman's demeanor-based credibility determinations only after a "careful review of the record" satisfied him that those determinations were "completely consistent with the weight of the evidence, and [were] also fully supported by the weight of the evidence." (JA 48-49.) Such a declaration cannot be disregarded "unless an examination of the whole record puts its acceptance beyond reason." *NLRB v. Donnelly Garment Co.*, 330 U.S. 219, 229 (1947). Notably, the Company points to no specific finding that gives reason to disbelieve Judge Davis's assertion that he gave the record a full and independent review.

Moreover, Judge Davis's decision is not a blanket approval of Judge Edelman's determinations. Specifically, Judge Edelman found (JA 16) that employee Salvador Concepcion "credibly testified" that a supervisor threatened him with job loss if he voted for the Union. However, Judge Davis came to a contrary conclusion, explaining that he "could not credit" Concepcion's testimony

about the threat because of Concepcion's "false testimony" about other incidents surrounding the threat. (JA 49, 64.) Thus, Judge Davis's refusal to blindly accept all of Judge Edelman's findings demonstrates that he gave the record a comprehensive review with an untainted eye.

Furthermore, the Board also conducted a *de novo* review of the record. *See Standard Dry Wall Products, Inc.*, 91 NLRB 544, 545 (1950) (noting that the Board is not "bound by the Trial Examiner's findings . . . and base[s] [its] findings as to the facts upon a *de novo* review of the record"), *enforced*, 188 F.2d 362 (3d Cir. 1951). When an administrative body considers all arguments and conducts a *de novo* review of the record, the court will "readily reject[]" a claim that copying of briefs into a decision violates due process. *Abhe & Svoboda, Inc. v. Chao*, 508 F.3d 1052, 1059 (D.C. Cir. 2007). Here, the Board stated (JA 43) that it "carefully examined" the record and found no reason to reverse the credibility findings. The Board's assertion that it conducted a thorough review of the record and failed to discover any impropriety cannot be treated lightly. "[U]nless an examination of the whole record puts its acceptance beyond reason," the Court must accept the Board's declaration that it conducted an independent review. *NLRB v. Donnelly Garment Co.*, 330 U.S. 219, 229 (1947).

Moreover, the record supports the Board's declaration that it "carefully examined the record." Specifically, the Board did not rubber stamp Judge Davis's

decision and instead reversed (JA 43-45) his finding that the Company violated the Act by discriminatorily discharging employee and union organizer Adan Aguilar. The Board's modification of Judge Davis's analysis demonstrates that the Board conducted its own independent review of the record and ensured against any perceived bias. *Casino Ready Mix, Inc. v. NLRB*, 321 F.3d 1190, 1202 (D.C. Cir. 2003) (holding that the Board's "correction" of judge's mistake supports Board's claim that it conducted independent review of record following judge's copying of a party's brief into the decision).[4]

2. A *de novo* hearing is not necessary to guarantee accurate credibility findings

In its facts section (Br. 10-11), the Company seemingly claims that the Remand Order is unjust because it allows Judge Davis to rely on Judge Edelman's demeanor-based credibility determinations. The Company then specifically contends (Br. 32-33) that because Judge Davis could not observe the witnesses, he could not make proper credibility resolutions. The Company points to several

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[4] The Company argues (Br. 21 n.10) that Judge Edelman's prior record demonstrates an enduring prejudice against employers, noting that the instant case is not the first time that the Board has chastised Judge Edelman for copying briefs. Evaluating a judge's impartiality based on the percentage of times he has ruled for a given side "amounts to judging his record by mere result or reputation." *Fieldcrest Cannon, Inc. v. NLRB*, 97 F.3d 65, 69 (4th Cir. 1996). "A decision-maker's ruling deserves to rise or fall on the case at hand, not on the results of other cases that have little bearing upon the issues before [the Court]." *Id.* Thus, Judge Edelman's prior decisions are irrelevant to determining whether his credibility assessments and findings in this case were proper.

examples to buttress its argument. However, the examples that the Company puts forth illustrate that Judge Davis's credibility determinations did not rely solely on Judge Edelman's demeanor-based resolutions, but were also based on such factors as the weight of the respective evidence, established and admitted facts, and the reasonable inferences to be drawn from the record as a whole.

The first example involves leadman Guillermo Serra's threat to employee Cesar Calderon that the employees would have to provide legal papers and green cards if the Union won the election. (JA 80.) In crediting Calderon's account of Serra's threat, Judge Davis noted (JA 54) that two other employees had testified that Serra had also threatened and interrogated them. (JA 132.) Further, Judge Davis explained (JA 54; 159) that Serra gave conflicting testimony regarding his opposition to the Union, stating first that he was ambivalent about the Union and then announcing that he opposed unions. Judge Davis also determined (A 54; 165) that the Company's instructions to its leadership to be "overly zealous at the risk of committing unfair labor practices" rendered it likely that Serra made the threat.

The Company also complains (Br. 32) that Judge Davis "never had the opportunity to observe whether [leadman Jon Cassone] was evasive." Again, the Company ignores Judge Davis's comprehensive credibility analysis. In examining whether Jon Cassone threatened employees with unspecified reprisals if they supported the Union and interrogated employees about their union activities, Judge

Davis did not rely solely on Judge Edelman's determination that Jon Cassone was "evasive." (JA 16; 83, 94, 103.) Rather, Judge Davis found (JA 53; 146, 150, 152) that Jon Cassone's admitted union animus and anger towards the Union supported a finding that Cassone engaged in the alleged unlawful behavior.

In the last example, the Company laments (Br. 32) that Judge Davis "never had the opportunity to decide which of the witnesses was more believable on the issue of whether rolls were actually lost when [Cesar Calderon][5] left his station." This contention involves the discriminatory suspension of Calderon, who left his work station to assist in quelling a physical altercation between an employee and a supervisor. (JA 55; 73-76.) In addressing this issue, Judge Davis noted (JA 55) that "[t]here was much evidence regarding whether bread was in the oven when Calderon left, and whether it had to be thrown out" because of his absence. However, Judge Davis found the conflicting testimony about the rolls in the oven to be "irrelevant" because the Company suspended Calderon for leaving his work station, not because his absence caused the bread to be lost. (JA 55; 76, 196.)

Moreover, in finding the termination unlawful, Judge Davis (JA 55-56; 142) explained that an independent route driver—unaffiliated with both the Union and the Company—testified that Calderon was "an especially important" presence in

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[5] The Company's brief (Br. 32) mistakenly identifies employee Aidan Aguilar as the employee who left the station. However, the Company disciplined Calderon, not Aguilar, for leaving his work station. (JA 55-56.)

resolving both the altercation and its aftermath. Judge Davis also noted that management personnel exaggerated "up to four times" the length of time Calderon was away from his station, claiming it was 60 minutes when other evidence, including testimony from Calderon's supervisor, showed his absence was a mere 15 minutes. (JA 56; 75, 155, 157.) Finally, Judge Davis plausibly observed (JA 56; 144, 145) that Supervisor Abraham's testimony that he ordered Calderon back to his work station was "incredible," given that Abraham was involved in the altercation and, "having been punched in the face," likely had other more pressing concerns.

As the above examples illustrate, Judge Davis relied on Judge Edelman's demeanor-based credibility assessments only after ensuring those findings were consistent with non-demeanor-based indicia of credibility. The Board explicitly cautioned (JA 11) that, despite his copying, Judge Edelman's findings were not necessarily erroneous and directed Judge Davis to ensure that the evidence supported all demeanor-based credibility assessments. Thus, Judge Davis's reliance on those assessments did not violate the Company's right to a fair hearing.[6]

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[6] In complaining that Judge Davis credited employees over management, the Company conveniently forgets the circumstances surroundings these incidents, namely the Company's aggressive antiunion campaign. "An atmosphere of reprisal and recrimination against union supporters may provide a context for evaluating the testimony of witnesses and no doubt enhance[s] the credibility of

3. The Company relies on inapposite cases

The Company relies (Br. 23-24) on a triad of cases to support its argument that a new hearing is the only proper remedy that can erase an impression of partiality. Those cases, however, are inapposite because they address claims of fact-finder partiality that are entirely different from the case at hand.

The first case in the triad is *Ba v. Gonzales*, 228 Fed.Appx. 7 (2d Cir. 2007), an unpublished decision reviewing the Board of Immigration Appeals's ("BIA") denial of an asylum petition. The court remanded the case to the BIA for review by a new Immigration Judge ("IJ") after observing that the original IJ's opinion contained a "plethora of errors and omissions" with respect to key determinative issues. *Id.* at 10. The court was more troubled, however, by the IJ's insistence that the petitioner reveal privileged attorney-client information during the hearing. *Id.* at 11. The court also expressed concern about the IJ's "unfair diatribe" accusing the petitioner of lying, a diatribe so unjust that the government attorney suggested that the IJ "move on and go forward with the hearing." *Id.* at 11 n.1. *Ba*, therefore, illustrates how egregious judicial misconduct—specifically, prejudicial remarks and erroneous fact-finding—can substantially erode an appearance of fairness or impartiality.

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those who were accusing the company of violations." *Fieldcrest Cannon, Inc. v. NLRB*, 97 F.3d 65, 72 (4th Cir. 1996).

In *Walsh v. Toole*, 663 F.2d 320 (1st Cir. 1981), the court considered a physician's petition for a conscientious objector discharge from the Navy. The court found that the Navy could not rely on the investigating officer's decision rejecting the petition because that officer's harsh credibility assessment of the physician—that he was a perjurer—was based on factual errors. *Id.* at 325. The court therefore determined that if a remand was necessary, the case should go to a different investigating officer. *Id.* Thus, *Walsh* stands for the straightforward principle that a court cannot rely on a credibility assessment where the assessment is based on a misreading of key evidence.

Finally, the Company also misplaces its reliance on *U.S. v. Whitman*, 209 F.3d 619 (6th Cir. 2000), a case addressing a defendant's request for a reduction in sentencing. There, the trial judge displayed undeniable animosity towards the defendant's counsel, berating that counsel for the better part of the hearing and creating the impression that the counsel's behavior caused the denial of the defendant's request for a sentence reduction. *Id.* at 625-26. The court determined that a remand to a different judge was necessary because the trial judge's "lengthy harangue in this case had the unfortunate effect of creating the impression that the impartial administration of the law was not his primary concern." *Id.* at 626.

Ba, Walsh, and *Whitman* have no relevancy to the case at hand. Here, the Company has not argued that Judge Edelman violated ethical codes, made factual

errors, or misread key evidence that tainted his credibility assessments. Likewise, Judge Edelman's copying of the briefs is not comparable to a diatribe accusing a witness of perjury, or a lengthy public tirade meant to belittle counsel's abilities and judgment. The Company does not claim that Judge Edelman conducted the hearing in a manner "designed to prevent and [actually] preventing a fair hearing," *Helena Labs. Corp. v. NLRB*, 557 F.2d 1183, 1188-89 (5th Cir. 1977), or that he showed a "predisposition so extreme as to display a clear inability to render a fair judgment," *Liteky v. U.S.*, 510 U.S. 540, 551 (1994). Rather, the only error that the Company points to is the verbatim use of other parties' briefs. Thus, while the appearance of bias in *Ba*, *Walsh*, and *Whitman* may have warranted a remand, the suggestion of partiality created by a substantial reliance on briefs does not.

B. The Company Rejected Judge Davis's Invitation To Brief Perceived Deficiencies in the First Hearing and To Recall Witnesses

The Company's quest for a *de novo* hearing is also troubling given that the Company rejected opportunities to challenge any specific inadequacies in how Judge Edelman conducted the hearing and to address any errors regarding his credibility choices. First, the Company conveniently disregards its refusal of Judge Davis's offer to file a brief regarding the Board's Remand Order. (JA 47 n.2.) If the Company had filed such a brief, the Company could have alerted Judge Davis to deficiencies in Judge Edelman's analysis. For example, the Company could

have identified for Judge Davis specific instances where it believed that Judge Edelman's apparent partiality affected his credibility determinations or findings of fact, such as those deficiencies that it now highlights in its brief (Br. 10-11, 32-33). Likewise, the Company also rejected Judge Davis's offer (JA 47 n.1) to reopen the hearing and to recall any witness for further testimony, which could have provided the Company with the first-hand demeanor-based credibility determinations that it now seeks (*see* discussion pp. 18-21). The Company's failure to embrace these opportunities renders its request for a new hearing rather disingenuous.

II. THE COMPANY WAIVED ITS BELATED ARGUMENT THAT THE BOARD'S REMAND ORDER VIOLATES THE ADMINISTRATIVE PROCEDURE ACT BY FAILING TO RAISE IT BEFORE THE BOARD

The Company claims that the Board violated the formal adjudication procedures set forth in the Administrative Procedure Act (5 U.S.C. § 554) ("APA") by allowing Judge Davis to make credibility determinations without observing the witnesses. As discussed below, however, the Court lacks jurisdiction to consider this claim because the Company failed to raise it before the Board. In any event, even if the Court had jurisdiction, the Board's Remand Order does not violate the APA because the Board's Supplemental Decision and Order reflects the demeanor-based findings made by the person who took the evidence and observed the witnesses.

A. The Board Never Had the Opportunity To Consider the Company's Argument that the Board's Refusal to Order a New Hearing Violated the APA

On appeal, the Company claims for the first time that the Board violated the APA's formal adjudication procedures when it refused to grant the Company's request for a *de novo* hearing. Specifically, the Company claims (Br. 25) that the APA requires that the same person both take the evidence and issue the decision, unless that person becomes unavailable. Because Judge Davis did not preside at the unfair labor practice hearing, the Company argues (Br. 30) that he was not "qualified" to issue a decision.

The Court is without jurisdiction to entertain this argument, however, because the Company failed to present it to the Board. Section 10(e) of the Act (29 U.S.C. § 160(e)) states, in pertinent part, that "[n]o objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." That statutory prohibition creates a jurisdictional bar against judicial review of issues not raised before the Board. *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982). As this Court has observed, the jurisdictional bar of Section 10(e) "'affords the Board the opportunity to bring its labor relations expertise to bear on the problem so that [the Court] may have the benefit of its opinion when [it] review[s] its determinations.'" *Teamsters Local*

115 v. NLRB, 640 F.2d 392, 398 (D.C. Cir. 1981) (quoting *NLRB v. Allied Products Corp.*, 548 F.2d 644, 653 (6th Cir. 1977)).

The Company's exceptions to the Board do not address the APA's requirement that the same individual take the evidence and make the decision. In fact, the exceptions neither mention nor cite the APA. In its exceptions, the Company objects to Judge Davis's "failure to observe the witnesses' demeanor and to make independent credibility resolutions based upon his seeing and hearing the witnesses in this case." (JA 30.) Even the Company's brief provides negligible expansion on this assertion, arguing generally that it was "denied due process" because Judge Davis made credibility determinations based upon a "cold record." (SA 231-232.) At most, therefore, the exceptions and brief proffer a general objection to Judge Davis's ability to make credibility determinations without observing the witnesses.

The Company therefore failed to give the Board notice of its alleged failure to adhere to the APA's specific requirements. It should not be allowed to raise the issue now for the first time on appeal. *See Parsippany Hotel Management Co. v. NLRB*, 99 F.3d 413, 417-18 (D.C. Cir. 1996) (petitioner's exceptions must alert Board of specific ground for exception in order to preserve issue for appeal); *see also Parkwood Dev. Center v. NLRB*, No. 07-1006, 2008 WL 995375, at *4 (D.C. Cir. Apr. 11, 2008) (holding that a party "forfeit[s]" its challenge to the Board's

findings by failing to first present its arguments to the Board). Indeed, to permit the Company to present its APA arguments to this Court would be contrary not only to the language of Section 10(e), but also would contravene the "salutary policy" embodied in that provision of "affording the Board the opportunity to consider on the merits questions to be urged upon review of its order." *Marshall Field & Co. v. NLRB*, 318 U.S. 253, 256 (1943) (per curiam). *See also United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) ("Simple fairness . . . requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practices.").

B. In Any Event, the Board's Decision Reflects Findings Made by the Person Who Presided Over the Hearing

Regardless of the Company's failure to raise its APA argument to the Board, the Board's decision does not violate the Company's rights under the APA as it reflects findings made by the person who took the evidence and observed the witnesses. In that regard, the Company's reliance on *Gamble -Skogmo v. FTC*, 211 F.2d 106 (8th Cir. 1954), and *Pigrenet v. Boland Marine & Mtg. Co.*, 631 F.2d 1190 (5th Cir. 1980), is misplaced because the scenario here differs from both of those cases.

In *Gamble-Skogmo*, an administrative law judge presided over the hearing but retired before making findings regarding the corporation's alleged unfair trade

practices. 211 F.2d at 110. A second judge examined the written record and determined that the corporation engaged in the unlawful practices. *Id.* at 111. In *Pigrenet*, the judge who presided over the hearing determined that the petitioner was permanently and totally disabled; however, the Benefits Review Board remanded for a finding regarding causation. 631 F.2d at 1190-91. A second judge, examining only the written record, determined that the petitioner did not incur his injury while working for the employer. *Id.* at 1191. In both cases, the courts remanded for a *de novo* hearing, citing the APA requirement that only the judge who heard the evidence should make the findings and issue a decision. *Gamble-Skogmo*, 211 F.2d at 117; *Pigrenet*, 631 F.2d at 1191-92.

In this case, however, the Company was not denied the APA's procedural safeguard of having the same individual take the evidence and render a decision. Unlike the judges in *Gamble* and *Pigrenet*, Judge Edelman heard the evidence and made findings on all key issues. Although Judge Edelman's decision relied heavily on copied briefs, he still "conducted the hearing properly and in an appropriately judicial manner," and the Board did not suggest that his findings "were in error." (JA 11.) Thus, the literal adoption of the briefs does not eradicate Judge Edelman's findings. Rather, "verbatim" adoption of briefs, "though not the product of the workings of the . . . judge's mind, are formally his; they are not to be rejected out-of-hand, and they will stand if supported by evidence." *U.S. v. El*

Paso Natural Gas Co., 376 U.S. 651, 656 (1964). As discussed above (pp. 15-18), the Board took several measures (remanding to Judge Davis for an independent review and conducting its own *de novo* review) meant to ensure that the ultimate decision was a fair result. Thus, unlike *Gamble-Skogmo* and *Pigrenet*, Judge Davis's decision relies on determinations made by the original fact-finder—determinations that should not be discarded.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that this Court deny the Company's petition for review and enforce the Board's Order in full.

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National Labor Relations Board
June 2008

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

J.J. CASSONE BAKERY, INC.	)	
	)	
Petitioner/Cross-Respondent	)	**Nos. 07-1300, 07-1345**
	)	
	)	
v.	)	
	)	**Board Case No. 02-CA-32559**
NATIONAL LABOR RELATIONS BOARD	)	
	)	
Respondent/Cross-Petitioner	)	
	)	
and	)	
	)	
BAKERY, CONFECTIONARY and TOBACCO WORKERS' UNION, LOCAL 3	)	
	)	
Intervenor	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), and this Court's Rules 28(d) and 32(a)(2), the Board certifies that its final brief contains 6,670 words in proportionally spaced, 14-point Times New Roman type, and that the word processing system used was Microsoft Word 2003.

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Dated at Washington, DC
this 17th day of June, 2008

STATUTORY ADDENDUM

Relevant provisions of the National Labor Relations Act as amended

(29 U.S.C.§§ 151 et. seq.):

Section 8 (a)[Sec.158]: [Unfair labor practices by employer] It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .

Section 10 of the Act (29 U.S.C. § 160 a, c, e, f):

(a) Powers of Board generally

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce. . . .

(c) Reduction of testimony to writing; findings and orders of Board

The testimony taken by such member, agency, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter . . . [i]f upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.

(e) Petition to court for enforcement of order; proceedings; review of judgment

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . .

(f) Review of final order of Board on petition to court

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. . . .

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

J.J. CASSONE BAKERY, INC.	)	
	)	
Petitioner/Cross-Respondent	)	**Nos. 07-1300, 07-1345**
	)	
	)	
v.	)	
	)	**Board Case No.**
NATIONAL LABOR RELATIONS BOARD	)	**02-CA-32559**
	)	
Respondent/Cross-Petitioner	)	
	)	
and	)	
	)	
BAKERY, CONFECTIONARY and TOBACCO WORKERS' UNION, LOCAL 3	)	
	)	
Intervenor	)	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Board has this date sent to the Clerk of the Court by first-class mail the required number of copies of the Board's final brief in the above-captioned case, and has served two copies of that brief by first-class mail upon the following counsel at the addresses listed below:

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Dated at Washington, DC
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